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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
October Term, 1989

FLORIDA DEPARTMENT OF LABOR
AND EMPLOYMENT SECURITY,

Petitioner,

v.

UNITED STATES DEPARTMENT
OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, pursuant to the interest section of the Debt Collection Act, the federal government may charge interest on a debt owed it by a state under a contract executed and completed before October 25, 1982, the claim for which was made subsequent to that date.

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Supreme Court Rule 20 2

THE OPINIONS IN THE COURT AND ADMINISTRATIVE AGENCIES BELOW

The opinion sought to be reviewed is *Florida Department of Labor and Employment Security v. United States Department of Labor*, 893 F.2d 1319 (11th Cir. 1990). That decision affirmed the final decision and order of Ann McLaughlin, Secretary of the United States Department of Labor, which, as to the question presented for review, reversed the opinion of Administrative Law Judge Daniel Lee Stewart. These three opinions are reprinted in the appendix accompanying the petition. References to the materials contained in the appendix will be made by the notation "(Pet. App.)." The court of appeals opinion appears at Pet. App. A-2; the McLaughlin opinion appears at Pet. App. A-14; the Stewart opinion appears at Pet. App. A-30.

JURISDICTION

The decision of the court of appeals was entered February 9, 1990. This petition has been filed and docketed within the period established by Supreme Court Rule 20 and 28 U.S.C. § 2101(c).

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 31, Chapter 37, United States Code

§ 3701. Definitions and application

• • •

(c) In section 3716 and 3717 of this title, "person" does not include an agency of the United States Government, of a State government, or of a unit of general local government.

§ 3717. Interest and penalty on claims

(a)(1) The head of an executive or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person that is equal to the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year, rounded to the nearest whole percentage

point. The Secretary of the Treasury shall publish the rate before November 1 of that year. The rate is effective on the first day of the next calendar quarter.

(2) The secretary may change the rate of interest for a calendar quarter if the average investment rate for the 12-month period ending at the close of the prior calendar quarter, rounded to the nearest whole percentage point, is more or less than the existing published rate by 2 percentage points.

• • •

(g) This section does not apply—

• • •

(2) to a claim under a contract executed before October 25, 1982, that is in effect on October 25, 1982.

• • •

STATEMENT OF THE CASE

The opinions of the Eleventh Circuit court of Appeals, the Administrative Law Judge (ALJ) and the United States Department of Labor (DOL) reflect the following facts:

The Florida Department of Labor and Employment Security (FDOLES) qualified to act as a Prime Sponsor under the provisions of the Comprehensive Employment and Training Act of 1973 (CETA). FDOLES, in turn, contracted with various state and local governmental entities and private organizations to deliver the services, as allowed under CETA.

FDOLES CETA grants were audited by DOL for the period covering October 1, 1980, through June 30, 1982. DOL released its audit report on May 24, 1984, and recommended disallowed costs totaling $145,460 according to the DOL grant officer's initial determination. After informal resolution proceedings, the grant officer issued his final determination on August 21, 1984, which established $14,437 as the debt owed by FDOLES to DOL, and provided that interest would be assessed on the debt.

FDOLES requested an ALJ hearing and during the proceedings the parties agreed that the alleged debt had been reduced to $6,555 due to payments made by FDOLES subgrantees. FDOLES argued that the Debt Collection Act, which authorizes DOL to collect interest on debts, specifically excludes debts owed by states. The ALJ reversed the grant officer's assessment of interest (Pet. App. A-30).

The grant officer appealed the ALJ's reversal of the interest assessment to the Secretary of DOL (Pet. App. A-14). In her opinion reversing the ALJ's determination that DOL is not entitled to interest, the Secretary acknowledged that the Debt Collection Act applied to the facts of the case. However,

> [t]he Secretary determined that DOL possessed a common law right to impose prejudgment interest on a defaulted contractual debt owed by a state and rejected FDOLES's argument that the Debt Collection Act of 1982 abrogated the federal government's common law right to recover interest on debts owed by states. In so concluding, the Secretary rejected the contrary holdings of three federal circuit courts of appeals, *see Arkansas v. Block*, 825 F.2d 1254, 1258 (8th Cir. 1987); *Pennsylvania Dep't. of Public Welfare v. United States*, 781 F.2d 334, 341–42 (3d Cir. 1986); *Perales v. United States*, 751 F.2d 95 (2d Cir. 1984) (per curiam), *aff'g* 598 F.Supp. 19 (S.D.N.Y. 1984), and instead relied upon an unpublished opinion from the Sixth Circuit. *County of St. Clair v. United States Dep't of Labor*, 754 F.2d 375 (6th Cir. 1984).

FDOLES v. DOL, 893 F.2d. 1319, 1321 (11th Cir. 1990).

FDOLES appealed to the Eleventh Circuit Court of Appeals, again relying upon the Debt Collection Act. During the appeal, DOL raised for the first time its contention that the Debt Collection Act was not applicable to the case. The Court, relying in part on this Court's decision in *West Virginia v. United States*, 479 U.S. 305 (1987), ruled that the Debt Collection Act was inapplicable to this mat-

ter and affirmed the Secretary's order without determining whether that Act abrogates the Federal government's common law right to collect interest (Pet. App. A-2).

REASONS FOR GRANTING THE WRIT

By refusing to apply the provisions of the Debt Collection Act, the Eleventh Circuit Court of Appeals has misconstrued an important section of the Act contrary to decisions reached by two other circuit courts of appeal.

The interest and penalty section of the Debt Collection Act does not apply "to a claim under a contract executed before October 25, 1982, *that is in effect on October 25, 1982*." 31 U.S.C. § 3717(g)(2). (Emphasis added.) The plain meaning of that language leads to the conclusion that if a contract executed before October 25, 1982, is *not* in effect subsequent to that date, the interest and penalty section does apply to a claim under the contract, unless otherwise exempted.

I. Decisions by Other Circuit Courts of Appeals

In *Perales v. United States*, 751 F.2d 95 (2nd Cir. 1984), the Court reviewed a summary judgment holding that the Department of Agriculture is not authorized to charge interest on debts arising out of the Food Stamp Program, 7 U.S.C. § 2011 *et seq.*, due it from the Department of Social Services of the State of New York. The Court affirmed the summary judgment ". . . for substantially the reasons stated in the district court's opinion." Id. The district court opinion reveals that each claim was

for a period between October, 1980 and March, 1982. The district court found that the provisions of the Debt Collection Act, specifically § 3717, did apply, but that the State of New York did not have to pay interest on the debt because of the definition of "person" at § 3701(c).

In *Commonwealth of Pennsylvania, Department of Public Welfare v. United States*, 781 F.2d 334 (3rd Cir. 1986), the Court reviewed a summary judgment holding that the Department of Agriculture is not authorized to charge interest on debts arising out of the Food Stamp Program, citing *Perales, supra*, as authority for holding that the Debt Collection Act abrogated the federal common law allowing the federal government to charge interest to states. The opinion does not discuss the time period for the contracts and the district court summary judgment is not reported. However, the district court judgment resulted from a *de novo* review of a State Food Stamp Appeals Board order dated July 6, 1983, reviewing the same debt. *Id.* at 337. On those facts, the underlying contract was not considered to be "in effect on October 25, 1982." The Third Circuit Court of Appeals found that the Debt Collection Act, specifically § 3717, did apply, but that the State of Pennsylvania did not have to pay interest on the debt because of the definition of "person" at § 3701(c).

II. Misconstruction of 31 U.S.C. § 3717(g)(2)

Like the circuit courts above, both the ALJ and the Secretary of DOL found that the Debt Collection Act applied to the facts of this case. The Secretary ruled, however, that the Act did not abrogate the Federal government's common law right to assess interest against a state agency

even though the agency was not a "person" as the term is used in section 3717 of the Act. 31 U.S.C. § 3701(g)(2) provides:

> (g) This section [interest and penalty on claims] does not apply—
>
> • • •
>
> (2) to a claim under a contract executed before October 25, 1982, that is in effect on October 25, 1982.

The Eleventh Circuit Court of Appeals interpreted the clause "that is in effect on October 25, 1982," to mean that even though a debt amount has been fixed as owing for a contractual period prior to October 25, 1982, the contract remains in effect for so long as the debtor continues to monitor its obligations past that date. In a footnote, the Court explained:

> This conclusion does not nullify the second clause of § 3717(g)(2). As stated earlier, § 3717(g)(2) provides that § 3717's mandatory imposition of interest requirements are not applicable "to a claim under contract executed before October 25, 1982, that is in effect on October 25, 1982." The "in effect on October 25, 1982" clause could have a meaning independent of the prior clause—e.g., a contract executed before October 25, 1982, but not taking effect until January 1, 1982, might not fall within the purview of § 3717(g)(2) and, consequently, might not be covered by the Debt Collection Act.

FDOLES v. DOL, supra at 1323, fn. 8. Petitioner knows of no rule of statutory construction that would allow for giving the second clause a meaning independent of the first. Congress clearly intended that where a contract had been completed so that the obligations of the parties were ascertainable, any resultant claim would be subject to an interest assessment.

The construction given by the Court will now allow contractors to argue that as long as they are obligated to monitor and audit subcontractor activities, the underlying contracts remain "in effect" and the contractors' liquidated debts are not subject to an interest assessment.

III. *West Virginia v. United States*, 479 U.S. 305 (1987).

The Eleventh Circuit Court also misapplied this Court's decision in *West Virginia v. United States, supra*. In that case, the contractual obligations for disaster relief arose ten years before enactment of the Debt Collection Act of 1982. This Court declined to apply the provisions of the Act because the contract and claim predated enactment of the interest and penalty provisions of the Act. The Court of Appeals focused on a portion of a footnote to this Court's opinion, which reads:

> As stated in § 3717(g)(2), this *statute* does not apply to claims arising under contracts entered into before October 25, 1982, and therefore has no force here. (Emphasis added.)

Id. at 312.

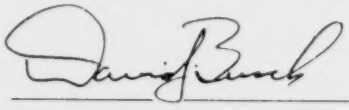
31 U.S.C. § 3717(g)(2) states that the *section* (interest and penalty on claims) does not apply to claims on contracts executed before and in effect on October 25, 1982. The *statute* as a whole took effect on October 25, 1982, and made interest and penalty provisions applicable to outstanding debts fixed subsequent to that date. When the grant officer in this case issued his initial determination on July 20, 1984, seeking a payment from Florida in the amount of $145,460, the Debt Collection Act *statute* was clearly in force and applicable to this claim. Until that initial determination there was no "claim", i.e., "amounts due the Government." 31 U.S.C. § 3701(b).

This argument is consistent in every respect with the holding in *West Virginia* because the Debt Collection Act of 1982 was not in effect when the Government made its claims in 1972 and 1973.

CONCLUSION

The decision of the Eleventh Circuit Court of Appeals holding that the Debt Collection Act of 1982 has no application to a federal claim established subsequent to the effective date of the Act because the contract giving rise to the claim was still "in effect" is contrary to the plain meaning of the statute and the authorities cited. Although the dollar amount of the claim here is small, the significance of this issue and the impact of the Eleventh Circuit opinion is enormous. Accordingly, Petitioner respectfully requests that this Petition for Writ for Certiorari be granted.

Respectfully submitted,



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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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FLORIDA DEPARTMENT OF LABOR
AND EMPLOYMENT SECURITY,

Petitioner,

v.

UNITED STATES DEPARTMENT
OF LABOR,

Respondent.

No. 89-3015.

United States Court of Appeals, Eleventh Circuit.

Feb. 9, 1990.

Review was sought of Secretary of Labor's final decision and order requiring Florida Department of Labor and Employment Security to repay certain costs incurred by its subgrantees of grant given to Florida Department of Labor and Employment Security pursuant to Comprehensive Employment and Training Act. The Court of Appeals, Anderson, Circuit Judge, held that Debt Collection Act did not apply and, thus Secretary was not precluded from recovering prejudgment interest.

Affirmed.

Petition for Review of Final Decision and Order of the Department of Labor.

Before TJOFLAT, Chief Judge, JOHNSON and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge:

This case comes to us on review of the Secretary of Labor's final decision and order requiring the State of Florida Department of Labor and Employment Security ("FDOLES") to repay certain costs incurred by FDOLES's subgrantees of a grant given to FDOLES by the U.S. Department of Labor ("DOL") pursuant to the Comprehensive Employment and Training Act ("CETA").[1] The only issue on appeal is whether the Secretary was precluded by the Debt Collection Act of 1982[2] from requiring FDOLES to pay prejudgment interest. Because we find that the provisions of the Debt Collection Act are not applicable under the facts of this case, we affirm the Secretary's imposition of prejudgment interest.

I. BACKGROUND

Between October 1, 1980 and June 30, 1982, FDOLES received approximately $27,259,029 in CETA funds. A May 24, 1984 audit of FDOLES and FDOLES's subgrantees' records questioned $327,598 in expenditures. A grant officer reviewed the audit and issued an initial determination disallowing $145,460 of the questioned costs. This determination informed FDOLES that DOL considered $55,801 of the disallowed total to be owed to DOL and noted that DOL would charge interest on disallowed costs beginning 30 days after the grant officer's final determination.

In response to the grant officer's initial determination, FDOLES submitted documentation for some of the disallowed costs and requested waiver of repayment. *See* 20 C.F.R. § 676.88(c). Upon consideration of the FDOLES

submission, the grant officer made a final determination in which he reduced the disallowed costs to $104,096, and ordered FDOLES to repay $14,437 with interest.

FDOLES requested an ALJ hearing to reconsider the grant officer's determination. At that hearing, FDOLES submitted evidence that it had collected a portion of its debt from its subrecipients of the federal CETA grant, and it renewed its arguments for a waiver of repayment.

The ALJ rejected the request for a waiver of repayment, reasoning that the disallowed costs resulted from poor documentation of records and that repayment was necessary to maintain an adequate incentive for recipients to keep proper records. The ALJ, however, reversed the grant officer's assessment of interest on the disallowed costs, determining that the Labor Department had not provided any authority for an assessment of interest against a state government.

The grant officer appealed the ALJ's reversal of the interest assessment to the Secretary. The Secretary determined that DOL possessed a common law right to impose prejudgment interest on a defaulted contractual debt owed by a state and rejected FDOLES's argument that the Debt Collection Act of 1982 abrogated the federal government's common law right to recover interest on debts owed by states. In so concluding, the Secretary rejected the contrary holdings of three federal circuit courts of appeals, *see Arkansas v. Block*, 825 F.2d 1254, 1258 (8th Cir.1987); *Pennsylvania Dep't of Public Welfare v. United States*, 781 F.2d 334, 341–42 (3d Cir. 1986); *Perales v. United States*, 751 F.2d 95 (2d Cir.1984) (per curiam), *aff'g* 598 F.Supp. 19 (S.D.N.Y.1984), and instead relied upon an unpublished opinion from the Sixth Circuit. *County of St.*

Clair v. United States Dep't of Labor, 754 F.2d 375 (6th Cir.1984).

This appeal of the assessment of interest followed.[3]

II. DISCUSSION

FDOLES argues on appeal that the Debt Collection Act of 1982 abrogates the federal government's common law right of collecting interest on a debt owed by a state governmental agency. In making this argument, FDOLES relies upon two provisions of the Act, 31 U.S.C. §§ 3717(a)(1), 3701(c). Section 3717(a)(1) provides that:

> The head of an executive or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person that is equal to the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year. . . .

Because pursuant to § 3701(c) an agency of a state government is not considered a "person" under § 3717, FDOLES contends that the federal government cannot impose a prejudgment assessment of interest against it. *Accord Arkansas v. Block*, 825 F.2d at 1258; *Pennsylvania Dep't of Public Welfare v. United States*, 781 F.2d at 341–42; *Perales*, 598 F.Supp. at 25–26.

The DOL defends the Secretary's conclusion, arguing variously that: (1) the Debt Collection Act, by its very terms, does not apply to this case; and (2) even if the Debt Collection Act does apply to this case, it does not abrogate

DOL's right (both under the statute and under common law) to assess prejudgment interest in this case.

A.

DOL's first contention, that the Act is not applicable in this case, was raised for the first time in this court. As a general rule in administrative law cases, a reviewing court may not affirm an agency decision on grounds not addressed by the agency, but, rather, will remand for the agency to address the issue in the first instance. *SEC v. Chenery Corp.*, 318 U.S. 80, 87–88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943). "The effect of this rule is 'that a reviewing court, in dealing with a determination or judgment which an agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.'" *NLRB v. Episcopal Community of St. Petersburg*, 726 F.2d 1537, 1540 (11th Cir.1984), quoting K. Davis, *Administrative Law Treatise*, § 14.29 (2d ed. 1980). In other words, courts are not entitled to substitute their judgment or determinations of proper policy for those of an administrative agency. If the agency has misapplied the law, its order cannot stand—even if the reviewing court believes that the agency either would reinstate its order under a different theory or would reach the same decision under the proper rule of law. *Chenery Corp.*, 318 U.S. at 94, 63 S.Ct. at 462. Instead, the case must be remanded to the agency to make a new determination.

Adherence to this rule does not mean, however, that this court will allow misconceptions in law that arise during the agency decision-making process to go unchecked. An important corollary to the general rule that courts will not substitute their views for the discretionary deci-

sions of an agency on matters of policy is the recognition that reviewing courts do have the authority and responsibility to correct errors of law made by the agency. *Chenery Corp.*, 318 U.S. at 94, 63 S.Ct. at 462; *Charter Limousine v. Dade County Bd. of County Comm'rs*, 678 F.2d 586, 588 (5th Cir.1982). Particularly in a case such as this where the resolution of the Debt Collection Act's applicability affect the parties' standing to raise the question of whether the Act abrogates the federal government's common law right to collect interest from the states, this court has an independent obligation to consider the applicability issue regardless of whether the issue is raised by either of the parties. *See, e.g., FW/PBS, Inc. v. City of Dallas*, ____ U.S. ____, ____, 110 S.Ct. 596, 607, ____ L.Ed.2d ____ (1990) (emphasizing that federal courts have an unflagging obligation under Article III of the Constitution to ensure that parties have standing to present their claims); *Bender v. Williamsport Area School District*, 475 U.S. 534, 541–43, 106 S.Ct. 1326, 1331–32, 89 L.Ed.2d 501 (1986) (same).

B.

Pursuant to 31 U.S.C. § 3717(g)(2), the relevant portions of the Debt Collection Act do not apply "to a claim under a contract executed before October 25, 1982, that is in effect on October 25, 1982." Thus, the question before this court is whether the current claim falls within this exception thus rendering the Debt Collection Act and its purported preemptive effect inapplicable.

FDOLES does not contest the fact that the DOL's CETA grants may be considered contracts, thereby raising the specter that § 3717(g)(2) may take this case out-

side the Debt Collection Act's reach. *See Bennett v. New Jersey,* 470 U.S. 632, 638–39, 105 S.Ct. 1555, 1559, 84 L.Ed.2d 572 (1985) (observing that many federal grant programs are "much in the nature of a contract") (quoting *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 17, 101 S.Ct. 1531, 1540, 67 L.Ed.2d 694 (1981)). Rather, FDOLES presents two separate arguments, each of which attempts to show that the § 3717(g)(2) exception has not been met and that, consequently, the Debt Collection Act's provisions are applicable to this case. In making these arguments, FDOLES concedes that the meaning of § 3717(g)(2)'s first requirement is unambiguous and that this requirement has been satisfied in this case: the instant claim is premised upon a contract executed before October 25, 1982. FDOLES focuses its attention on the second clause of § 3717(g)(2)—"in effect on October 25, 1982"—and offers two different interpretations of the clause, both of which it claims establishes that this second criterion has not been met.

First, FDOLES contends that this second clause mandates that there exist continued contractual obligations beyond October 25, 1982, before the Debt Collection Act may be viewed as inapplicable. FDOLES avers that the contract in question in this case must be considered as being coextensive with the period covered by the audit. Because the audit period in this case ran from October 1, 1980 through June 30, 1982, FDOLES claims that its contractual obligations ceased on June 30, 1982, and that consequently no contract was "in effect on October 25, 1982" as required under § 3717(g)(2).

This argument is without merit, both as a factual and as a legal matter. With regards to the facts in this case, it is apparent that, while the grant period extended only

from October 1, 1980 through June 30, 1982, FDOLES as the prime sponsor of the federal government's CETA grant[4] assumed continuing responsibilities for monitoring the actions of its contractors and subrecipients to ensure that their actions complied with the program's statutory and regulatory requirements.[5] Among other things, these responsibilities included the continued monitoring and auditing of subrecipients to ensure that their records were being kept in accordance with program regulations and to ensure that the subgrant funds were being expended in compliance with CETA.[6] It is uncontested that FDOLES, as part of its monitoring obligations, engaged in these activities well into 1984.

Moreover, as a matter of law, FDOLES's argument cannot be reconciled with the Supreme Court's decision in *West Virginia v. United States*, 479 U.S. 305, 107 S.Ct. 702, 93 L.Ed.2d 639 (1987). In *West Virginia*, the federal government provided services to West Virginia in 1972. The government billed the state for its services in late 1972 and early 1973. When the state had not remitted payment to the federal government by 1978, the federal government initiated suit. *Id.*, at 306–09, 107 S.Ct. at 704–05. The issue before the Supreme Court in *West Virginia* concerned whether the federal government could obtain prejudgment interest against the state. In holding that the federal government was entitled to prejudgment interest as a matter of federal common law, the Supreme Court decided the issue on the basis of federal common law. The Court declined, however, to reach the issue of whether the Debt Collection Act abrogated the government's federal common law right to collect interest from the states, reasoning that "th[e] statute does not apply to claims arising under contracts entered into before Oc-

tober 25, 1982, and therefore has no force here." *Id.*, at 312 n. 6, 107 S.Ct. at 707 n. 6.[7]

As was the case in *West Virginia*, the contract at issue in this case was executed before October 25, 1982. Thus, even if we were to assume that FDOLES had completed its performance obligations prior to October 25, 1982, *West Virginia* would dictate the conclusion that the Debt Collection Act was simply inapplicable in this matter.[8]

In its second argument, FDOLES seeks to distinguish *West Virginia* by asserting that § 3717(g)(2)'s second clause—"in effect on October 25, 1982"—modifies "claim," not "contract." In other words, FDOLES argues that § 3717(g)(2) provides that § 3717 is not applicable only where: (1) the contract is executed before October 25, 1982, and (2) the government's claim for money owed under the contract is in effect before October 25, 1982. Although this reading would be consistent with the results in *West Virginia* and in *Riles v. Bennett*, 831 F.2d 875, 878 (9th Cir.1987) (per curiam), *cert. denied*, 485 U.S. 988, 108 S.Ct. 1291, 99 L.Ed.2d 501 (1988), this reading requires a construction of the statute neither apparent on its face nor supported by legislative history.[9] *See* S.Rep. No. 97-378, 97th Cong. 2d Sess. 29, *reprinted in* 1982 U.S.Code Cong. & Admin.News 3377, 3405 (the mandatory imposition of interest provision, § 3717, "shall not apply to any claim under a binding contract executed before the effective date of this subsection"). Because we find no evidence to support this strained interpretation of the statute, we decline to attribute the statute with FDOLES's proposed construction.

Accordingly, we conclude that the provisions of the Debt Collection Act are inapplicable to this matter. As a

result, we need not enter the fray and detemine whether the Debt Collection Act abrogates the federal government's common law right to collect interest. *Compare Arkansas v. Block*, 825 F.2d at 1258 (Act abrogates common law interest); *Pennsylvania Dep't. of Public Welfare v. United States*, 781 F.2d at 341–42 (same); *Perales v. United States*, 751 F.2d 95 (2d Cir.1984) (per curiam), *aff'g* 598 F.Supp. 19 (S.D.N.Y. 1984) (same), *with Gallegos v. Lyng*, 891 F.2d 788 (10th Cir.1989) (federal government maintains common law right to recover interest against state and local governments); *County of St. Clair v. United States Dep't of Labor*, 754 F.2d 375 (6th Cir.1984) (same).

C.

Having determined that Act is not applicable to this case, we must now determine whether we must remand this case for a new determination as to the imposition of interest. As we discussed, *supra*, slip op. at 1671–1672, at ——— - ———, the general rule in administrative law cases is that courts, upon finding that an agency made an error of law, are not to presume that an agency will adhere to its original decision notwithstanding its prior misconception of the legal standards. The Supreme Court has, however, recognized a limited exception to this rule: "the rule in *Chenery* has not required courts to remand in futility." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 756 n. 7, 106 S.Ct. 2169, 2176 n. 7, 90 L.Ed.2d 779 (1986) (citing *Illinois v. ICC*, 722 F.2d 1341, 1348–49 (7th Cir.1983)). Our conclusion that the Debt Collection Act's provisions are inapplicable in this case is clearly one that falls within this rule. In making her original decision, the Secretary exercised what she

believed to be her right under the federal common law to impose prejudgment interest. In so doing, she concluded that the Debt Collection Act's provisions did not abrogate her right to do so. Having held that the Debt Collection Act's provisions are not applicable to this case, then the question is solely whether the DOL may, under federal common law, collect prejudgment interest. The Secretary has already made clear what her decision is with regard to that question. Consequently, a remand would be pointless. *See Illinois, v. ICC*, 722 F.2d at 1349.

FDOLES concedes that the Secretary possessed the common law right to impose interest and does not challenge her decision to do so in this case. Consequently, we conclude that Secretary's decision must be affirmed.

AFFIRMED.

FOOTNOTES

1. Pub.L. No. 93-203, §§ 1 *et seq.*, 87 Stat. 839 (1974), *as amended by* Pub.L. No. 95-524, §§ 1 *et seq.*, 92 Stat. 1909 (1978) (repealed 1982). CETA, as amended, was repealed by § 184 of the Job Training Partnership Act, 29 U.S.C. §§ 1501 *et seq.* Under the transitional provisions of that Act, pending cases continue to be adjudicated under CETA. 29 U.S.C. § 1591(e).

2. Pub.L. No. 97-365, 96 Stat. 1749 (1982).

3. *See* 29 U.S.C. § 817(a) (Supp.V 1981) (repealed).

4. *See* 29 U.S.C. § 811(a)(1); 20 C.F.R. § 676.2(a).

5. *See* 29 U.S.C. § 835(a)(1) (repealed); 20 C.F.R. §§ 676.37(a)(3), 676.75-1, 676.75-2. *See generally City of St. Louis v. U.S. Dep't of Labor*, 787 F.2d 342, 346 (8th Cir.1986); *Montgomery County v. Dep't of Labor*, 757 F.2d 1510, 1512–13 (4th Cir.1985).

6. *See, e.g.*, 20 C.F.R. §§ 676.75-1, 676.75-2.

7. Contrary to FDOLES's assertions, it is not possible to characterize this footnote in *West Virginia* as *obiter dictum*. The Supreme Court necessarily had to determine whether the Debt Collection Act was applicable to the case before it. The Court had already concluded that the federal government was authorized under federal common law to collect interest from West Virginia; if the case had not fallen within § 3717(g)(2)'s scope, the Court would have been required to address the additional issue of whether the Act abrogated the federal government's common law right.

8. This conclusion does not nullify the second clause of § 3717(g)(2). As stated earlier, § 3717(g)(2) provides that § 3717's mandatory imposition of interest requirements are not applicable "to a claim under contract executed before October 25, 1982, that is in effect on October 25, 1982." The "in effect on October 25, 1982" clause could have a meaning independent of the prior clause—e.g., a contract executed before October 25, 1982, but not taking effect until January 1, 1983, might not fall within the purview of § 3717(g)(2) and, consequently, might not be covered by the Debt Collection Act.

9. Traditionally, it is not thought that a claim is "in effect"; rather, if Congress had sought to reach this result it would have formulated the statute in a manner such as follows: "this section does not apply to a claim under contract executed by October 25, 1982, where the claim is formally presented by October 25, 1982."

DEPARTMENT OF LABOR,

Complainant,

v.

STATE OF FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY,

Respondent.

No. 84-CTA-228

BEFORE: THE SECRETARY OF LABOR

Dec. 9, 1988

FINAL DECISION AND ORDER

This case arises under the Comprehensive Employment and Training Act (CETA). 29 U.S.C. §§ 801–999 (Supp. V 1981).[1] The dispute involves the question of the Department of Labor's authority to recover interest on a debt owed by a state government.

BACKGROUND

On July 22, 1986, Administrative Law Judge (ALJ) Daniel Lee Stewart affirmed the Grant Officer's disallowance of $6,555 of costs incurred by subgrantees of the State of Florida Department of Labor and Employment Security (FDOLES), under subgrants made pursuant to the state's CETA grant. In addition, the ALJ ruled that the Department of Labor (DOL) was not entitled to recover interest on the disallowed costs.[2] On

August 11, 1986, the Grant Officer filed a statement of exceptions challenging only the ALJ's ruling that DOL lacked authority to recover interest on the debt. On August 19, 1986, the Secretary asserted jurisdiction and stayed the ALJ's decision. The parties were invited to submit briefs in the case. FDOLES' Initial Brief addressed the issue of the DOL's authority to recover interest on debts owed by state governments to the Federal government and raised an additional issue regarding the equitable consideration of requiring a CETA grantee to repay the disallowed expenditures of its subgrantees.[3] The Grant Officer's Initial Brief addressed the government's right to levy an interest charge on state CETA grantees and his Reply Brief challenged the timeliness of FDOLES' raising the issue of equitable consideration for the first time before the Secretary in its Initial Brief.

DISCUSSION

The pertinent provision of the Debt Collection Act of 1982, now codified at 31 U.S.C. § 3717(a)(1) (1982), amending the Federal Claims Collection Act of 1966, 31 U.S.C. § 952, requires the head of an executive agency, such as the Secretary of Labor, to charge a minimum annual rate of interest on an outstanding debt owed by a person to the United States Government.[4] Enactment of the Debt Collection Act reflected Congress' concern at the failure of many Federal agencies to collect debts owing to the Federal government, and when such debts were collected, the exacting of below market interest rates on the overdue debts.[5]

The term "person" in § 3717(a)(1) originally was defined as not including any agency of the United States or any

state or local government.[6] Subsequent language changes were not intended to change the substantive meaning of the statute, but were enacted for the sake of clarity and conformity.[7]

FDOLES contends that exclusion of "State government" from the definition of the word "person" prohibits the imposition of an interest charge on its outstanding debt to the Department of Labor. While the statute exempts state government agencies from the mandatory imposition of interest charges, I find that it does not abrogate the Federal government's common law right to assess interest against entities not covered by the Act. The effect of the exemption for the states from the requirement that interest be charged has been construed by the Comptroller General, Comptroller General's Decision, B-212222, issued August 23, 1983; by the Comptroller General and the Attorney General in pertinent regulations at 4 C.F.R. § 102.13(i)(1) and (2) (1988);[8] and by this Department in regulations at 29 C.F.R. § 20.51(a)(1), and (b) (1988).[9]

The Supreme Court has recognized for more than a century the common law right of a creditor to be compensated by interest payments for the loss of use of funds by defaulting debtors. *Young v. Godbe*, 82 U.S. (15 Wall) 562, (1872) (Interest due on a debt to a private citizen despite the absence of a statutory right). And the Court has enunciated the right of the Federal government to collect interest on debts owed by a state, although it declined, in the face of the state law expressly forbidding the imposition of interest by private parties, to extend this right to an individual who was a ward of the Federal government. *Board of Commissioners of Jackson County v. United States*, 308 U.S. 343, 352 (1939).

FDOLES cites decisions by the United States Courts of Appeals for two circuits which have addressed the issue of a federal agency's right to impose an interest charge on overdue debts owed by states following enactment of the amended Debt Collection Act. In *Perales v. United States*, 751 F.2d 95 (2d Cir. 1984), the court affirmed the district court's decision that the Department of Agriculture was not authorized to charge interest on debts between the Department and state agencies arising out of the food stamp program. In granting summary judgment for New York, the district court had held "invalid"

> FNS' [Food and Nutrition Service of the U.S. Department of Agriculture] policy of assessing late payment interest against state agencies, ... especially so in light of the fact that the Federal Claims Collection Act, which set forth congressional policy for the collection and settlement of debts by federal agencies, was expressly made inapplicable against state agencies by the Debt Collection Act of 1982.

Perales v. United States, 598 F. Supp. 19, 24 (S.D.N.Y. 1984).

In *Commonwealth of Pennsylvania Department of Public Welfare v. United States*, 781 F.2d 334 (3d Cir. 1986), *reh'g* and *reh'g en banc denied*, the court also denied the right of FNS to charge late payment interest on debts incurred by a state agency under the Food Stamp Act. However, the United States Court of Appeals for the Sixth Circuit, while considering the impact of the Debt Collection Act of 1982 (DCA) on the Federal Claims Collection Act, held that the Department of Labor could impose an interest charge on recouped misspent CETA grant funds.

County of St. Clair, Michigan v. United States Department of Labor; Rita Jacobs, No. 83-3546, slip op. at 3 (6th Cir. Dec. 7, 1984) (per curiam) (LEXIS, Genfed library, Supcir file).[10]

Subsequent to the *Perales* and *Pennsylvania Department of Welfare* decisions, the Supreme Court again affirmed the right of the Federal government to impose interest charges on a defaulted contractual debt owed by a state. *West Virginia v. United States*, 479 U.S. 305 (1987). While finding that the DCA had no applicability to the case before it because the claim at issue was made under a contract executed before October 25, 1982, 31 U.S.C. § 3717(g)(2), 479 U.S. at 312, n.6, the Court noted that "[p]rejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." 479 U.S. at 310, n.2. The Court declined to opine regarding the effect of the Debt Collection Act on Federal common law governing when States must pay interest. 479 U.S. at 312, n.5.[11]

Counsel for the Grant Officer contends that the Second and Third Circuits are in error in their construction of the DCA. The Grant Officer points out that while the DCA mandates the collection of interest against *private* debtors, it does not speak about or abolish the collection of interest against public entities. Here, the Grant Officer asserts, interest assessments against state governments have not been foreclosed or expressly prohibited by the DCA, rather such interest assessments merely have been excluded from *mandatory* coverage. This circumstance, it is argued, does not warrant a legal conclusion that the DCA preempted the field regarding recovery of interest

from states by the Federal government. Grant Officer's Brief to the Secretary of Labor at 14–18.

Since the case before me arises in the Eleventh Circuit, and under a different statute, I am not bound by the courts' decisions in *Perales* and *Pennsylvania Department of Public Welfare*, and upon consideration, I decline to follow them here. The Federal government's common law right to recoup lost economic opportunity through an interest provision on overdue debts is too well founded to cede without express direction from Congress or the Court.

I find the Grant Officer's analysis persuasive. The DCA leaves to the discretion of agency heads the question of charging interest on obligations of state and local governments. As noted, *supra* at 3, the legislative history of the Debt Collection Act reflects Congress' concern over the failure of many agencies to collect debts at all, and their practice of charging interest below market rates if it was assessed at all. S. Rep. No. 378, 97th Cong., 2d Sess., 3–4, *reprinted in* 1982 U.S. Code Cong. & Admin. News 3377, 3379–80. This history shows no intention by Congress to relieve states entirely from the payment of interest.

Moreover, this construction of the DCA accords with that of the Department of Justice and the General Accounting Office in the regulations implementing the Act. 4 C.F.R. § 102.13(i)(2). Those agencies rejected the argument that the Debt Collection Act totally preempts the common law and that the Act's exemptions therefore amount to prohibitions. 49 Fed. Reg. 8,891 (1984). The promulgation of those provisions said that "the common law right to charge interest continues to exist [but] the limits, procedures, and other requirements of the Debt

Collection Act do not apply to those debts that are exempt from the interest provision of the act. . . ." *Id.* at 8,894.

In *Rodgers v. United States*, 332 U.S. 371 (1947), the Court distinguished between financial obligations which arise from penalties or punishment for criminal activities and those which arise from a purely contractual basis. The Court determined that in situations such as *Rodgers*, where the financial obligation was in the nature of a fine for non-cooperation with the Agricultural Adjustment Act that no interest shall bear. But, the Court reasoned, when there is a breach of an obligation and actual money damages are suffered by reason of the breach, the aggrieved party should be fairly compensated for the loss. 371 U.S. at 373.

The misspending of program funds by FDOLES' subgrantees is in direct contravention of Congress' intention regarding the CETA funds' appropriation and obligation. The loss suffered by the intended CETA beneficiaries occasioned by the misexpenditures, is direct and measurable, and the public is equitably entitled to the interest on such funds. The interest is not in the form of a punishment or deterrent but rather compensation for misused funds.

In its brief submitted after jurisdiction was asserted, FDOLES attempts to raise a challenge to the ALJ's determination that "equitable purposes are served by requiring repayment" of the $6,555. FDOLES did not challenge this ruling by filing exceptions as provided in the Department's regulations, 20 C.F.R. § 676.92(f) (1988), and the regulation states expressly that "[a]ny exception not specifically urged shall be deemed to have been waived." Ac-

cordingly, this challenge to the ALJ's equitable analysis is not before me.[12]

The ALJ's determination that the Department of Labor is not entitled to interest on disallowed costs is REVERSED. The Florida Department of Labor and Employment Security is directed to repay to the Department the sum of $6,555 with interest in accordance with the Grant Officer's Final Determination in this case.

SO ORDERED.

Secretary of Labor

Washington, D.C.

FOOTNOTES

1. Effective October 13, 1982, CETA was replaced by the Job Training Partnership Act. 29 U.S.C. §§ 1501–1781 (1982). However, CETA continues to govern administrative or judicial proceedings pending on October 13, 1982, or begun between October 13, 1982, and September 30, 1984. 29 U.S.C. § 1591(e).

2. *In the Matter of Department of Labor v. State of Florida Department of Labor and Employment Security,* Case No. 84-CTA-228. Decision and Order of the Administrative Law Judge, issued July 22, 1986.

3. Initial Brief of the State of Florida for Review of an Order of the U.S. Department of Labor's Administrative Law Judge, served October 29, 1986, at 9–11.

4. The head of an executive or legislative agency *shall* charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person that is equal to the average investment rate for the Treas-

> ury tax and loan accounts for the 12-month period ending on September 30 of each year, rounded to the nearest whole percentage point. The Secretary of Treasury shall publish the rate before November 1 of that year. The rate is effective on the first day of the next calendar quarter.

31 U.S.C. § 3717(a)(1) (emphasis supplied).

5. S. Rep. No. 378, 97th Cong., 2d Sess., 1, 3, 17, 28, *reprinted in* 1982 U.S. Code Cong. & Admin. News 3377, 3379, 333, 3404, 3405.

6. The Debt Collection Act of 1982, Pub. L. No. 97–365, § 11, 96 Stat. 1749, 1756 (1982).

7. "In Section 3716 and 3717 of this title, 'person' does not include an agency of the United States Government, of a State government, or of a unit of general local government." 31 U.S.C. § 3701(c) (1982).

8. 4 C.F.R. §d 102.13, *Interest, penalties, and administrative costs,* states in ~~part:~~—

> (i) *Exemptions.* (1) The provisions of 31 U.S.C. 3717 do not apply: (i) To debts owed by any State or local government;
> . . .
>
> (2) However, agencies are authorized to assess interest and related charges on debts which are not subject to 31 U.S.C. 3717 to the extent authorized under the common law or other applicable statutory authority.

9. 29 C.F.R. § 20.51, *Exemptions,* states in part:

> (a) The provisions of 31 U.S.C. 3717 do not apply:
>
> (1) To debts owed by any State or local government;
> . . . .
>
> (b) Agencies are authorized to assess interest and related charges on debts which are not subject to 31 U.S.C. 3717 to the extent authorized under the common law or other applicable statutory authority.

10. I am, of course, cognizant of the general disfavor accorded the use of unpublished decisions. *See* e.g. 6th Cir. R. 24(b); 11th Cir. R. 36-1 I.O.P. 3. Since the court of appeals decision in *County of St. Clair, Michigan*, construed the DCA in the context of misspent CETA grant funds, and it is the only court case found addressing the two statutes together, I believe it cannot be ignored and that reference to it in this decision is in keeping with the spirit of the courts of appeals' rules. A copy of the *St. Clair* opinion is appended.

11. In a 1987 case, *Arkansas v. Block*, 825 F.2d 1254 (8th Cir.), *reh'g denied*, the court of appeals followed *Perales* and *Pennsylvania Department of Public Welfare* in determining that the Department of Agriculture lacked authority to assess interest on a state's unpaid penalties imposed under the food stamp regulations. The Eighth Circuit panel distinguished the Fourth Circuit's analysis in *United States v. West Virginia*, 764 F.2d 1028 (1985), *aff'd* 479 U.S.305 (1987), on the basis that West Virginia's debt predated the effect of the Debt Collection Act. The Eighth Circuit did not address the Supreme Court's affirmance of the Fourth Circuit's decision.

12. Had this issue been timely and properly appealed, DFOLES's arguments would be neither compelling nor persuasive. The funds were disallowed because the State failed to ensure that its subgrantees maintain and produce adequate spending records. It is not punitive to require the repayment of funds when adequate records supporting the expenditure of those funds cannot be produced for an audit, and a grantee's responsibility is not mitigated through its use of community based organizations as subgrantees. It is well established that a grantee's responsibility includes the maintenance of adequate records for they are the only indicia that public funds were lawfully spent. *Montgomery County, Md. v. Department of Labor*, 757 F.2d 1510 (4th Cir. 1985).

Neither does case law compel consideration of the equities in a case when grant funds have been misspent. *Quechan Indian Tribe (Quechan Tribal Council) v. United States Department of Labor*, Case No. 80-BCA/CETA-97, Secretary's Final Decision and Order, issued February 4, 1988, slip op. at 4–6, *citing Bennett v. New Jersey*, 470 U.S. 632 (1985); *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985); *State of California Department of Education v. Bennett*, 829 F.2d 795 (9th Cir. 1987).

COUNTY OF ST. CLAIR, MICHIGAN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR; RITA JACOBS,

Respondents.

No. 83-3546

United States Court of Appeals for the Sixth Circuit

Before: LIVELY, Chief Judge; ENGEL, Circuit Judge; and WEICK, Senior Circuit Judge.

PER CURIAM. The County of St. Clair, Michigan (County) petitions for review of a decision of the United States Department of Labor ordering repayment of certain Comprehensive Employment and Training Act (CETA) funds allegedly misspent by the County. The County claims that the decision below was not supported by substantial evidence and should be set aside for good cause.

The County was a prime sponsor for the disbursement of funds under CETA, 29 U.S.C. § 801, *et seq*, throughout the duration of the CETA program, handling up to 900 CETA participants at times. Ms. Rita Jacobs was employed by the County as an independent monitor of its CETA programs. On March 26, 1980, Ms. Jacobs filed a complaint with the Department of Labor alleging CETA violations by the County. A Labor Department grant officer conducted an investigation and made a determina-

tion against the County. The County requested and was granted a formal hearing before Administrative Law Judge Melvin Warshaw (ALJ) to review the dispute.

In a decision issued June 2, 1983, the ALJ found that the County had improperly spent CETA funds to subsidize the employment of (1) two teachers in parochial schools, (2) a woman who did not meet the program's financial or employment need requirements, and (3) a woman whose husband was on the County's Board of Commissioners. The ALJ ordered the County to repay the Department of Labor the amount of the misspent funds and, additionally, interest on that amount. Finally, the ALJ found that certain CETA participants may have been underpaid when they were employed at "outstationed" locations; however, the ALJ concluded that the evidence in the record cocerning actual wages and hours of the underpaid employees was insufficient. The ALJ, therefore, remanded the "outstationed" employee issue to the grant officer for additional fact-finding. The Secretary of Labor did not act on the ALJ's decision and order. Thus, under 20 C.F.R. § 676.91(f) (1984), the ALJ's decision became the final action of the Department. The County petitions for a review of that action.

The Secretary has moved here to dismiss the County's petition on the grounds that the ALJ's decision did not finally resolve all issues. We conclude that we have jurisdiction over those portions of the ALJ's order which go to the merits of the first three issues described above. However, we find that we do not have jurisdiction over the "outstationed" employee claim because that issue has not been finally resolved; it awaits further consideration by the grant officer upon remand by the ALJ. Yet, in our judgment this does not preclude a finding of finality with

regard to the first three issues; as to those issues, the ALJ's decision has become the final action of the Secretary and is appropriately before us for review.

On the merits, the County argues that the ALJ's findings of fact concerning the misspent funds were not supported by substantial evidence and that good cause exists to set aside the ALJ's order. The County also claims that the order to pay interest was in violation of 31 U.S.C. § 3701.

A careful review of the record and of the parties' briefs satisfies us that there is substantial evidence to support the Secretary's decision as to each of the challenged claims. While in each case the question was close, it must be observed that there was at least competent evidence to support the violations found.

In its brief, the County appears to tacitly acknowledge the existence of the violations; nonetheless, it points to language in the Act which arguably empowers our court to remand the case to the Secretary for new or different findings of fact "for good cause shown," 29 U.S.C. § 819(b). The County argues that the ALJ's decision should be reserved "for good cause" because in each of the challenged cases the County misspent the CETA funds, if at all, inadvertently and in good faith. The County contends that under such circumstances, an order to repay those funds which have been irrevocably spent is inequitable.

While some of the County's arguments have a limited appeal for the reasons stated in its brief, we conclude that they are not sufficient to constitute "good cause" in view of the Secretary's responsibility to monitor dispersal of CETA funds and to carry out the Congressional mandate

concerning supervision of their expenditures. Congress has committed the enforcement of violations which are supported by substantial evidence to agency discretion. Even if the good cause provision authorizes us to grant relief where there is substantial evidence to support the Secretary's decision, it does not compel us to alter that decision merely because we disagree with the result the Secretary reached.

Likewise, we remain unpersuaded that the Department was without power to order the payment of interest merely because the Federal Claims Collection Act, as amended by the Debt Collection Act of 1982, 31 U.S.C. § 3701, *et. seq.*, appears to include a unit of local government among those defined as "person" in the definitional provisions of the Act, 31 U.S.C. § 3701(c).

To the extent that the ALJ's remand of the "outstationed" employee issue to the grant officer has been placed in issue in these proceedings, that portion of the County's petition is not subject to review as a final order of the Secretary and is dismissed as interlocutory. *See Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 88 (1984).

The remainder of the petition of the County of St. Clair is DENIED.

CERTIFICATE OF SERVICE

Case Name: *In the Matter of Department of Labor v. State of Florida Department of Labor and Employment and Security*

Case No. : 84-CTA-228

Document : Secretary's Final Decision and Order

A copy of the above-referenced document was sent to the following persons on _____.

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DEPARTMENT OF LABOR,

Complainant,

v.

STATE OF FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY,

Respondent.

DECISION AND ORDER

Case No.: 84-CTA-228

STATEMENT OF THE CASE

This proceeding arises under the Comprehensive Employment and Training Act of 1973, as amended, 29 U.S.C. §801, *et seq*. The dispute involves whether certain costs of the State of Florida's CETA Program were properly disallowed.

Alexander Grant & Company, Certified Public Accountants, conducted an audit of $27,259,029 in CETA grant funds awarded to the State of Florida and issued a report on May 24, 1984. The report questioned costs of $327,598. On the basis of the audit report, on July 20, 1984, Grant Officer Newstell Dowdell, Jr., made an initial determination that $182,138 of the questioned costs were allowable and $145,460 were unallowable costs under the terms of the grant, the Act, or the applicable federal regulations. The Grant Officer tentatively determined that $55,801 of the unallowable costs was the debt owed to the Department of Labor by the State of Florida. (Adm. File 46-48).

After informed resolution proceedings, the Grant Officer issued his final determination on August 21, 1984. He determined that there were $104,096 in unallowable costs. Of the $104,096 in unallowable costs, $14,437 was established as the debt owed to the Department of Labor by the State of Florida. The Grant Officer stated that the debt would become delinquent if not paid within 30 calendar days after the final determination and that interest would be assessed on the delinquent debt. (Adm. File 5-7).

On August 29, 1984, the State of Florida announced that it disagreed with the Grant Officer's final determination and requested a hearing. However, on December 20, 1985, the State of Florida moved that the case be decided on the pleadings and administrative record. The motion was granted on December 30, 1985.

Memoranda subsequently submitted by both parties agree that the alleged debt has been reduced to $6,555 due to payment of a portion of the debt by subgrantees of the State of Florida. The remaining $6,555 consists of costs claimed by two other subgrantees, Annie Mattox Recreational Center, Inc., and Gulf County CETP, Inc. These two organizations had contracted with the State of Florida to deliver services through the use of a portion of the State's CETA grant, as is allowed under the Act. The reason specified in the audit report for disallowing $1,619 in Annie Mattox Recreational Center's costs was primarily lack of time sheets to support payment of wages. A small amount of the disallowed costs was due to lack of documentation to support payments to Florida Power and Light and Mabry Brothers. The reason specified in the audit report for disallowing $4,936 in Gulf County CETP's costs was lack of time sheets to support payment of wages.

ISSUES

1. Whether $6,555 in the State of Florida's CETA Program costs was properly disallowed.

2. Whether the assessment of interest on the amount of the disallowed costs was proper.

DISCUSSION

The Motion to Strike

Included in the State of Florida's Memorandum of Law, submitted January 29, 1986, is a motion to strike the evidence relating to the disallowed costs. State of Florida cites 5 U.S.C. §556(d), a provision of the Administrative Procedure Act, as authority for its position. That section provides:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof . . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence . . . .

The State of Florida asserts §556(d) places the burden of proof on the Department of Labor and the audit summaries, which are hearsay, do not amount to "substantial evidence" sufficient to carry that burden. However, the burden placed on the Department of Labor by §556(d) is, in fact, merely the burden of making a prima facie case.

According to the First Circuit Court of Appeals in *State of Maine v. U.S. Department of Labor,* 669 F.2d 827 at 829 (1982):

> [§556(d)] has been interpreted to refer to the burden of production and not the ultimate burden of persuasion; the latter may be on the party challenging the order. *Environmental Defense Fund, Inc. v. EPA,* 548 F.2d 998 (D.C. Cir. 1976); *Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals,* 523 F.2d 25, 39 (7th Cir. 1975) (opinion on petition for rehearing). In its thorough opinion in *Environmental Defense Fund, Inc.,* the court examined the legislative history of 5 U.S.C. §566(d), canvassed the case law, and concluded that the burden on the proponent is one of producing sufficient evidence to make out a prima facie case. 548 F.2d at 1012–1018 (supplemental opinion on petition for rehearing).

As noted in *State of Maine,* the substantive statute and its regulations, rather than the APA, govern the allocation of the ultimate burden of persuasion. The CETA Act allocates the burden of persuasion in 20 C.F.R. §676.90(b) (1979), which provides:

> The party requesting the hearing shall have the burden of establishing the facts and the entitlement to the relief requested.

Thus, the State of Florida has the burden of persuasion.

The State of Florida argues that §676.90(b) was never properly promulgated because it was never published as a proposed rule. However, Administrative Law Judge Rudolph

Sobernheim refuted this argument in *State of Florida, Department of Labor and Employment Security,* 81-CETA-A-202 (February 1, 1984). He explained:

> [I]t is not required that the administrative regulation which is adopted be identical to the proposed version published for comment. *Chrysler Corp. v. DOT,* 515 F.2d 1053 (6th Cir. 1975) . . . and the Department was not required to publish in advance every proposal which it ultimately adopted as a part of its rule. *(CA Cit. Band Ass'n v. U.S.,* 375 F.2d 43 (9th Cir. 1979), *cert. den.,* 389 U.S. 844 (1967)).

As noted by Judge Sobernheim, §676.90(b) is not a novel or surprising regulation; it merely places the burden of persuasion on the party most likely to be familiar with and in possession of the facts.

The State of Florida has submitted excerpts from the Federal Register in an attempt to establish that §676.90(b) was not properly promulgated. The excerpts do not support the State's argument. They merely indicate that 20 C.F.R. Part 676, Subpart F, remains in effect as published on April 3, 1979. Therefore, I find that the State of Florida's argument that the regulation is invalid because it was not properly promulgated is without merit.

Thus, the burden of persuasion rests on the State of Florida, while the Department of Labor need only meet the burden of production. The burden of production is satisfied where the evidence "is sufficient to enable a reasonable person to draw from it the inference sought to be established." *State of Maine,* 669 F.2d at 830 (quoting McCormick, Evidence 789–790 (2d Ed. 1972)). The De-

partment of Labor's evidence consists of excerpts from the audit conducted by Alexander Grant & Co. The excerpts indicate that time sheets documenting certain labor costs were missing. Documentation of a small amount of other expenditures also was missing. It would certainly be reasonable to draw the conclusion from this audit evidence that the money for the undocumented expenditures was not actually spent in the manner claimed by the recipients of the grant.

While the State of Florida finds the audit evidence inadequate because it is hearsay, the State, itself, noted that "hearsay may be substantial evidence if its use is fundamentally fair and if it has probative value." *Calhoun v. Bailar,* 626 F.2d 145 (9th Cir. 1980), *cert. denied,* 452 U.S. 906 (1981). (State of Florida's Memorandum, p. 8). The accuracy of the audit evidence is not suspect. The auditors concluded certain documentation of costs was missing, and the State of Florida has not argued that this conclusion is false. If the State of Florida believed the documentation was, in fact, available, it had ample opportunity to produce that documentation for the fact finder. The State of Florida failed to do so or to specify any reason that the audit evidence should be found unreliable. Thus, the motion to strike is denied.

Citation to the Wrong OMB Circular

The State of Florida points out that the audit report relies on cost principles set forth in Office of Management and Budget Circular A-102 as the basis for questioning the expenditures in issue. OMB Circular A-102, Attachment C2, requires that "financial records, supporting documents, statistical records and all other records pertinent to a grant shall be retained for a period of three

years . . . ." The State of Florida correctly observes that OMB Circular A-122, rather than A-102, gives the cost principles applicable to the type of organizations whose costs were questioned.

I find, however, that the auditors' citation to the wrong circular is of no significance. Circular A-122, Attachment A, A2g, states:

> *Factors affecting allowability of costs.* To be allowable under an award, costs must meet the following general criteria . . . .
>
> . . . be adequately documented.

Since documentation of spending is required under either circular, citation to the wrong circular was an error of form rather than substance.

The State of Florida contends that the citation to the wrong circular in the instant case creates a situation similar to that in *Flannery v. Carroll*, 676 F.2d 126 (5th Cir. 1982). In *Flannery*, the court held that the defendant could not be found to have violated a state securities law, since only federal securities laws were mentioned in a pretrial order and contested at the trial. The State of Florida's reliance on *Flannery* is misplaced. While the defendant was obviously prejudiced in that case because of omission of the state law claims in the pretrial order, no prejudice resulted from the auditors' citation to the wrong circular in the instant case.

Equitable Considerations

The State of Florida argues that equitable purposes must be weighed before requiring repayment of sums disallowed under CETA grants. *Quechan Indian Tribe v. U.S. Department of Labor,* 723 F.2d 733 (9th Cir. 1984). The State of Florida notes that the fraction of its total CETA grant which was disallowed by the Grant Officer was minuscule and that the State substantially performed its duties with the CETA funds. It argues that since most of the CETA expenditures were not questioned and the evidence demonstrates that the subgrantees used adequate timekeeping systems, no purpose would be served by requiring repayment of the undocumented expenditures.

I find, however, that equitable considerations are served by requiring repayment. Requiring the recipient to establish that it spent its CETA grant in accordance with the requirements of the Act and regulations serves the obvious purpose of ensuring that federal funds are not misused. If the failure to document all expenditures were excused merely because most expenditures were properly documented, grant recipients would be invited to cut corners and keep inadequate records. Proper use of federal funds would not be ensured. The fact that the repayment sought from the State of Florida is small in comparison to the total amount of the grant simply indicates that the sanction is commensurate with the small degree of noncompliance.

The affidavits submitted by the State of Florida in support of its memorandum do not explain why time sheets to support some expenditures were missing. Nor do the affidavits prove that the questioned funds were spent in com-

pliance with the Act. Yet the State of Florida contends that because the affidavits show existence of timekeeping systems, the questioned funds must have been properly spent. However, establishing adequate timekeeping systems alone will not ensure proper use of federal funds. The systems must be used consistently and records preserved if use of federal funds is to be monitored.

The State of Florida also contends that it should not be required to reimburse the Department of Labor because of the doctrine of *quantum meruit*. Black's Law Dictionary defines *quantum meruit* as:

> An equitable doctrine, based on the concept that no one who benefits by the labor and materials of another should be unjustly enriched thereby; under those circumstances, the law implies a promise to pay a reasonable amount for the labor and materials furnished, even absent a specific contract therefor.

Black's Law Dictionary, 5th Ed. (1979).

The doctrine of *quantum meruit* is not applicable to this case. The State of Florida has failed to show that it provided any goods or services with the portion of the funds disallowed by the Grant Officer. Thus, there is no reason to imply a contract.

In conclusion, the State of Florida has provided no evidence that the questioned funds were spent in compliance with the Act or that the audit drew false conclusions. Therefore, the State has failed to meet its burden of persuasion under 20 C.F.R. §676.90(b). There are no equitable

factors that make requiring the State to repay the funds unfair.

Assessment of Interest

In the Grant Officer's final determination, he stated that interest would be assessed on the disallowed costs if repayment was not made within 30 calendar days. The Grant Officer did not specify any authority that allowed the Department of Labor to charge interest. He stated that if the debt became delinquent, the Department of Labor would initiate appropriate collection action in accordance with the Federal Claims Collection Standards, 4 CFR §§102–105.

The State of Florida argues that the Federal Claims Collection Act of 1966, which authorizes the Department of Labor to collect interest on debts, specifically excludes debts owed by states. 31 U.S.C. §§3701(c), 3717. Moreover, the regulations cited by the Grant Officer, 4 C.F.R. §§102–105, provide that while federal agencies shall assess interest on debts owed to the United States pursuant to 31 U.S.C. §3717, the provisions of §3717 do not apply to debts owed by any state or local government. 4 C.F.R. §§102.13(a), 102.13(i)(1).

The Department of Labor's only response is citation to a decision entitled: "Matter of: Debt collection—Administrative Offset and Interest against State and Local Governments," Decision of the Comptroller General of the United States, File B 212222, August 23, 1983. The decision states:

> . . . to the extent that there is authority other than sections 10 and 11 of the Debt Collection

> Act of 1982 (whether founded in statute or common law), agencies of the Federal Government are authorized to . . . assess interest or other authorized charges against state and local governments . . . .

The Department of Labor fails, however, to cite any statutory or common law authority empowering it to assess interest on the State of Florida's debt. Therefore, I find that the Department of Labor is not empowered to charge interest on the disallowed costs.

ORDER

The final determination of the Grant Officer is affirmed, with the following modifications:

1. The State of Florida's debt has been reduced to $6,555.

2. The Department of Labor is not entitled to interest on the disallowed costs.

Pursuant to 20 C.F.R. §676.91(f), this Decision and Order constitutes the final action of the Secretary of Labor unless modified or vacated by the Secretary within 30 days after it is served.

DANIEL LEE STEWART
Administrative Law Judge

DATE ISSUED: July 22, 1986